Southern Bank Bhd v Chuah Beng Hock

HIGH COURT (MELAKA) — ORIGINATING SUMMONS NO 24-169 OF 1998
SURIYADI J
16 DECEMBER 1998

Land Law *— Charge — Registration — Failure to register — Overdraft secured by charge over land — Additonal sum granted — Second charge on same land not registered — Unregistered charge included in Form 16D — Whether charge was effective — Whether plaintiff had right to recover second facility from same land*

Land Law *— Sale of land — Order for — Application for order — Cause to the contrary existed — Whether order for sale should be granted*

The plaintiff granted an overdraft facility to the defendant for the sum of RM1.8m which was secured by a charge over a piece of land. Subsequently, an additional sum of RM700,000 was sought for by the defendant from the plaintiff, thus increasing the facility to RM2.5m. This additional RM700,000 was conditional on the same piece of land being charged a second time in favour of the plaintiff. When the material document was brought to the land office for registration, that office refused to register the second charge. In spite of that failure, the plaintiff still disbursed the additional RM700,000. Therefore, the material land had only one charge over it. The defendant defaulted in the periodical payments and the plaintiff took up proceedings to foreclose the land. The plaintiff sent a notice of demand to the defendant, claiming the sum of RM2,725,415.20 inclusive of interest. Upon failure of the defendant to comply with the notice of demand, a notice in Form 16D under the National Land Code 1965 ('the NLC') was served on him. The defendant objected to the notice in Form 16D as it amounted to an unregistered charge being included in that statutory form.

Held, dismissing the originating summons:

(1) Under s 243 of the NLC, Parliament had promulgated that every charge created under the NLC shall take effect upon registration so as to render the land or lease in question liable for security. In simple words, for the purposes of the NLC, no charge is effective unless registered (see pp 211F–G).

(2) The inclusion of the unregistered charge would clearly prejudice the rights of the defendant. The land was only charged up to RM1.8m. An additional burden of RM700,000 would only make repayment impossible. By aggregating the additional RM700,000 with the RM1.8m, and therefore riding it together with the latter sum, the plaintiff had unilaterally given itself the right to recover the second facility also from the same land. This course of action was undertaken in spite of it being aware that the attempts to have the second charge secured over the same land had been defeated by the land office. The plaintiff, if it wished to recover anything

above the RM1.8m, had to do so from another source, perhaps as a judgment debt. In the circumstances of the case, as there existed cause to the contrary, the court could not allow the application for order for sale (see p 212C–H).

[**Bahasa Malaysia summary**

Plaintif telah memberikan kemudahan overdraf kepada defendan untuk jumlah sebanyak RM1.8 juta. Kemudahan tersebut telah dicagarkan dengan satu gadaian ke atas sebidang tanah. Kemudiannya, jumlah tambahan sebanyak RM700,000 telah diminta oleh defendan daripada plaintif, dengan itu menambahkan kemudahan kepada RM2.5 juta. Jumlah tambahan itu adalah bersyarat ke atas tanah yang digadaikan untuk kali kedua atas nama plaintif. Apabila dokumen yang berkenaan dibawa ke pejabat tanah untuk pendaftaran, pejabat tersebut telah enggan mendaftarkan gadaian yang kedua itu. Walaupun pendaftaran gagal, plaintif masih juga membayar jumlah tambahan sebanyak RM700,000. Maka tanah berkenaan hanya mempunyai suatu gadaian sahaja ke atasnya. Defendan kemudiannya telah gagal membuat pembayaran berkala dan plaintif memulakan prosiding untuk menutup gadai janji. Plaintif menghantar satu notis tuntutan kepada defendan, menuntut jumlah sebanyak RM2,725,415.20 termasuk faedah. Setelah defendan gagal untuk mematuhi notis tuntutan itu, satu notis di dalam Borang 16D di bawah Kanun Tanah Negara 1965 ('KTN') telah disampaikan kepadanya. Defendan telah membantah terhadap notis di dalam Borang 16D memandangkan ia membawa kepada gadaian yang tidak berdaftar dimasukkan ke dalam borang statutori itu.

Diputuskan, menolak saman pemula:

(1) Merujuk kepada s 243 KTN, Parlimen telah mengisytiharkan bahawa setiap gadaian yang dibuat di bawah KTN hendaklah berkuatkuasa selepas pendaftaran agar dapat memberikan tanah atau pajakan berkenaan liabiliti untuk dicagarkan. Di dalam perkataan yang mudah, bagi tujuan KTN, tiada gadaian yang berkuatkuasa melainkan setelah didaftar (lihat ms 211F–G).

(2) Kemasukan gadaian tak berdaftar itu akan menjejaskan hak-hak defendan. Tanah tersebut hanya digadaikan untuk sejumlah RM1.8 juta sahaja. Satu beban tambahan sebanyak RM700,000 hanya akan menjadikan pembayaran semula menjadi mustahil. Dengan mengumpulkan tambahan sebanyak RM700,000 itu dengan RM1.8 juta, dan kemudiannya menjumlahkannya dengan jumlah yang terkemudian itu, plaintif telah secara senyap-senyap memberikan kepada dirinya sendiri hak untuk mendapatkan semula kemudahan yang kedua itu daripada tanah yang sama. Tindakan ini dijalankan walaupun ia sedar bahawa percubaan-percubaan untuk mencagar gadaian kedua itu ke atas tanah yang sama telah ditolak oleh pejabat tanah. Andainya plaintif ingin

mendapatkan semula apa-apa yang melebihi RM1.8 juta itu, ia haruslah berbuat demikian daripada sumber lain, mungkin sebagai satu hutang penghakiman. Di dalam hal keadaan kes, memandangkan wujudnya sebab yang bertentangan, mahkamah tidak dapat melayani permohonan untuk perintah jualan (lihat ms 212C–H).] A B

Notes

For cases on registration of charge, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1512–1517.

For cases on application for an order for sale in relation to cause to the contrary, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2605–2622. C

Cases referrred to

Bank Bumiputra Malaysia Bhd v Esah bte Abdul Ghani [1986] 1 MLJ 16 (refd) D

Bank of Tokyo Ltd v Shin Huat Joo Enterprise Sdn Bhd & Ors [1989] 3 CLJ 1275 (refd)

Co-operative Central Bank Ltd v Meng Kuan Properties Bhd [1991] 2 MLJ 283 (refd)

Jacob v Overseas-Chinese Banking Corp, Ipoh [1974] 2 MLJ 161 (refd) E

Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119 (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457 (refd)

Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266 (refd)

Malaysian International Merchant Bankers Bhd v Chi Liung Holdings Sdn Bhd [1992] 1 MLJ 735 (refd) F

Malaysian International Merchant Bankers Bhd v G & C Securities Sdn Bhd & Anor [1988] 2 MLJ 471 (refd)

Mary Michael v United Malayan Banking Corp Bhd [1971] 1 MLJ 172 (refd)

Oriental Bank v Chup Seng Restaurant (Butterworth) Sdn Bhd [1990] 3 MLJ 493 (refd) G

Siong Holdings Sdn Bhd v Development & Commercial Bank Bhd [1997] 1 MLJ 340 (refd)

Southern Bank Bhd v Shin Huat Joo Enterprise Sdn Bhd & Ors [1998] 3 CLJ 941 (refd) H

Syarikat Kewangan Melayu Raya Bhd v Malayan Banking Bhd [1984] 1 MLJ 115 (distd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 4(3) I

National Land Code 1965 ss 243, 253, 254

A *Wong Hock Mun* (*Azim Ong & Krishnan*) for the plaintiff.
HP Chuah (*Ong & Partners*) for the defendant.

Suriyadi J: The defendant enjoyed an overdraft facility for the sum of RM1.8m from Southern Bank Bhd ('the plaintiff') pursuant to an agreement. This facility was secured by fixing a legal charge over a piece of B land under Title No HS(D) 6694, PT 73, Kawasan Bandar XXXI, District of Melaka Tengah. Subsequently, an additional sum of RM700,000 was sought for by the defendant from the plaintiff, thus increasing the facility to RM2.5m. This additional RM700,000 was conditional on the same piece of land being charged a second time in favour of the plaintiff. When the material document was brought to the land office for registration, that office C refused to register the second charge. In spite of that failure, the plaintiff still disbursed the additional RM700,000. Therefore, for all intents and purposes, the material land had only one charge over it. Subsequently, the defendant failed to make the periodical payments and the plaintiff took up proceedings to foreclose the material land. By 13 May 1998, the gross sum D owed, inclusive of interest had exceeded RM2.7m. Pursuant to the agreement of the facility, and in line with s 253 of the National Land Code 1965 ('the NLC'), the plaintiff sent a notice of demand to the defendant, to the tune of RM2,725,415.20 inclusive of interest. The inclusion of interest in this statutory form for the RM1.8m is legally in order as it may be legitimately included (*Jacob v Oversea-Chinese Banking* E *Corporation, Ipoh* [1974] 2 MLJ 161; *Mary Michael v United Malayan Banking Corp Bhd* [1971] 1 MLJ 172). This act of the plaintiff for an order of sale is not an attempt to enforce a judgment debt, but merely enforcing a right as a chargee, by exercising his statutory remedy under the NLC (*Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119; *Siong Holdings Sdn Bhd v Development & Commercial Bank Bhd* [1997] 1 MLJ 340). The F plaintiff is entitled to do so, as, by the creation of that charge it had acquired an interest in that land, albeit the legal title and ownership of the land still remaining, vested in the name of the registered proprietor. Further to this, in passing, by virtue of this legal predicament, the court's powers in relation to interest is also curtailed. It may only impose interest on the sum owing on the rate agreed between the parties from the date of the order to the date G of the public auction.

As delineated in the NLC, the plaintiff did the needful after hiccups occured in the adherence of the obligations by the defendant pursuant to the facility agreement. To retrace the steps undertaken, the plaintiff initiated the preliminary actions prior to the foreclosure proceedings by H serving a letter of demand to the defendant (*Malaysian International Merchant Bankers Bhd v Chi Liung Holdings Sdn Bhd* [1992] 1 MLJ 735). Since the plaintiff could not take immediate steps to sell the charged land, it awaited the expiration of the time as shown in the notice. Only after the chargor had breached his obligation relating to the repayment of money, did a Form 16D follow in its wake, pursuant to s 254 of the NLC. This I seemingly simple and succinct Form 16D unfortunately was objected to by the defendant, on the premise that that form was invalidated as it included the additional RM700,000 disbursed to him. The inclusion of this sum was

objected to as it tantamount to an unregistered charge being included in that statutory form. I accepted the objection and dismissed the originating summons. I now give my reasons for dismissing it.

A foreclosure action is a separate action to that of any kind of contractual agreement and may be undertaken by an aggrieved party regardless of the existence of that agreement (*Bank Bumiputra Malaysia Bhd v Esah bte Abdul Ghani* [1986] 1 MLJ 16; *Malaysian International Merchant Bankers Bhd v G & C Securities Sdn Bhd & Anor* [1988] 2 MLJ 471; *Bank of Tokyo Ltd v R Gnanasurian* [1989] 2 CLJ 1275; *Southern Bank Bhd v Shin Huat Joo Enterprise Sdn Bhd & Ors* [1998] 3 CLJ 941). I even had occasion to comment at p 962 at para h in the case of *Southern Bank Bhd v Shin Huat Joo Enterprise Sdn Bhd & Ors*, thus:

> I do not intend to stray too much into this territory as it is settled law that creditors may commence action against guarantors simultaneously with foreclosure proceedings. They are at liberty to choose whatever course of action they desire ... .

This additional right which is statutory based, to be effective, require full compliance of the statutory provisions, inclusive of the relevant procedural aspects. Form 16D forms part of that procedural stage. In order to comprehend fully the practical aspect of this statutory form, I hereby reproduce in toto the material Form 16D, currently being discussed:

> National Land Code
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> Form 16D
>
> (Section 254)
>
> Notice of Default With Respect to a Charge
>
> To:
>
> Chuah Beng Hock
>
> c/o Cherating Construction Sdn Bhd
>
> 155, Jalan Aminuddin Baki
>
> Taman Tun Dr Ismail
>
> 60000 Kuala Lumpur.
>
> Chargor under the charge described in the schedule below of the land so described.
>
> Whereas you have committed a breach of the provisions of this charge by failing to repay on demand the following sums:
>
> Overdraft Facillty Account No 1036018739 amount outstanding as at 11 March 1998 — RM2,725,415.20.
>
> Interest:Further interest to accrue at the rate of 2.5% pa above our client's base lending rate (BLR) currently fixed at 12% pa on monthly rests on the principal sum of RM2,500,000 and at the rate of 5% pa above our client's BLR of monthly rests on any excess over the principal sum from 12 March 1998 until the date of full settlement.

A And whereas the breach has continued for a period of at least seven (7) days prior to the date of this notice.

We, as chargee, by virtue of the powers conferred by s 254 of the National Land Code hereby require you within the period the seven (7) days from the service of this notice to remedy the breach.

B And take notice that if you fail to remedy the breach within that period, we shall apply for an order and sale.

Dated 1 April 1998.

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C Solicitors for the chargee

Azim Ong & Krishnan

5th Floor, Southern Bank Building

49, Jalan Hang Lekiu

50100 Kuala Lumpur.

D Although this statutory form is singular in expression, as it is 'with respect to a charge', the law is clear that under s 4(3) of the Interpretation Acts 1948 and 1967 (Act 388), singular words and expressions include the plural and words and expressions in the plural include the singular. The enunciation of this principle was firmly established when the Federal Court in *Syarikat Kewangan Melayu Raya Bhd v Malayan Banking Bhd* [1984] E 1 MLJ 115 opined so. So, why the different treatment with this case? At the outset, permit me to clarify that the facts of the current case are distinguishable with that of the latter. In *Syarikat Kewangan Melayu Raya Bhd v Malayan Banking Bhd*, both the charges were registered whilst in the current case, only one was.

F Before I proceed with the legal dissertation, it is quite necessary for me to refer to s 243 of the NLC. As regards this section, Parliament in ringing terms had promulgated that every charge created under this Code shall take effect upon registration, so as to render the land or lease in question liable as security. In simple words, for purposes of the NLC, no charge is effective unless registered. I am not unmindful of the case of *Mahadevan & Anor v* G *Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266, in particular where the Federal Court commented, inter alia, that there were no provisions in the NLC prohibiting the creation of equitable charges or liens. Mohamed Dzaiddin J in *Oriental Bank v Chup Seng Restaurant (Butterworth) Sdn Bhd* [1990] 3 MLJ 493, after considering the above case of *Mahadevan & Anor*, H adjudged that whilst the NLC did not prohibit the creation of an equitable charge, the NLC on the other hand requires the charge to be registered in its prescribed form before it could be enforced. The facts of *Oriental Bank v Chup Seng Restaurant (Butterworth) Sdn Bhd* were that the plaintiff had stepped into the shoes of Citibank NA by subrogation and thereafter had wanted to enforce that right by wishing to obtain an order for sale. The only I snag was that inspite of having paid Citibank in full, the plaintiff failed to have the fresh charge registered in favour of the plaintiff. Due to that failure, the plaintiff's application was dismissed. Mohamed Dzaiddin J at p 495B opined:

> It must, first and foremost, be recognized that the NLC 1965 adheres strictly to the principle of registration and recognizes only parties who are registered under the Code ... . Secondly, s 243 clearly stipulates that every charge created shall take effect upon registration so as to render the land or lease liable as security ... . Thus, from the above sections of the Code it is abundantly clear to all and sundry that the Code recognizes only registered chargees.

This view was similarly held by Judith Sihombing in her book *National Land Code* at pp 498 and 499.

Apart from the above reasons, the inclusion of the unregistered charge would clearly prejudice the rights of the defendant. I find support for this stance in the case of *Syarikat Kewangan Melayu Raya Bhd v Malayan Banking Bhd*, where Mohd Azmi FJ said (at p 118):

> In our view, whether a notice of default with respect to a charge or charges in Form 16D is bad in law would depend on whether the chargor has been prejudiced or misled by any defect in the notice so as to render the granting of the order of sale unjust, and this in turn must necessarily depend on the circumstances of each particular case.

In the current case, I fail to see how the defendant could not be prejudiced in the foreclosure proceedings when the land was only charged up to RM1.8m. An additional burden of RM700,000 would only make repayment impossible. The inclusion of the interest which emanated from the RM700,000 certainly will be of no help either. To summarize this point, by aggregating the additional RM700,000 with the RM1.8m, and therefore riding it together with the latter sum, the plaintiff had unilaterally and sneakily given itself the right to recover the second facility also from the same land. This course of action was undertaken in spite of it being aware that the attempts to have the second charge secured over the same land had unceremoniously been defeated by the land office. Whether the land office was wrong in rejecting the registration of the second charge is another matter. Had it been wrong, the onus was on the plaintiff to correct the mistake by some other remedies. To conclude, it was thus encumbent upon the plaintiff, if it so wishes, to recover anything above the RM1.8m (except for the interest built into it) from another source perhaps as a judgement debt.

In the circumstances of the case, as I was satisfied of the existence of cause to the contrary, I therefore could not entertain the application for order for sale (s 256(3) of the NLC; *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457; *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283). In the latter case, the court held that the Form 16D was ineffectual and invalid as evidence showed that in that form was included the element of default interest. The remarks of Lim Beng Choon J there certainly would not be far off its mark, and applicable to the current case, where he said (at p 288):

> It is not a simple case of the said notices of demand containing an erroneous sum but it is a case where the said notices were demanding payment of something to which the plaintiff bank had no right.

A As in this case, the plaintiff had no right to demand the additional RM700,000 or the interest attached to it through the conduit of the NLC. On that premise, I dismissed the originating summons with costs.

Originating summons dismissed.

B Reported by Mohd Rizal Abidin

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